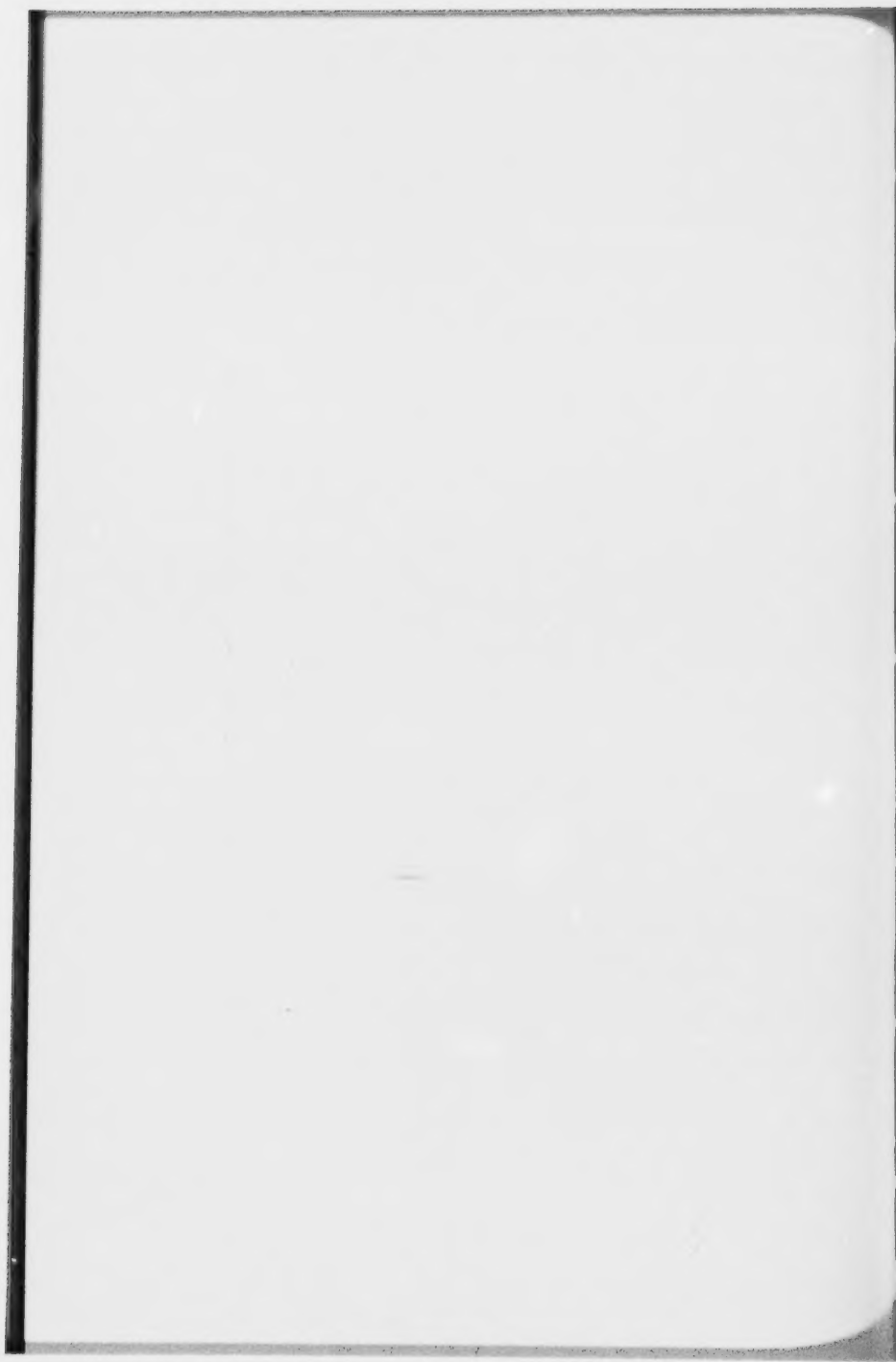


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*In the Supreme Court of the United States*

OCTOBER TERM, 1940

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No. 527

CARL M. LOEB, JR., PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

---

No. 528

HENRY A. LOEB, PETITIONER

*v.*

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE

---

*ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SECOND  
CIRCUIT*

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**BRIEF FOR THE RESPONDENT IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Board of Tax Appeals (R. 25-28) is reported in 40 B. T. A. 517. The opinion of the Circuit Court of Appeals is reported in 113 F. (2d) 664.

**JURISDICTION**

The judgments of the Circuit Court of Appeals were entered August 5, 1940. (R. 98-99.) The petition for writs of certiorari was filed October 26, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTION PRESENTED**

The taxpayers, Carl, Jr., and Henry Loeb, created a trust, naming their father as trustee with discretionary power to distribute the net income at the end of each year to the grantors or their mother, sister or brother. The question presented is whether the grantors are taxable under Section 167 of the Revenue Acts of 1932 and 1934 on the entire trust income for 1933 and 1934. The answer to this question depends upon whether the father had a "substantial adverse interest" in the trust income within the meaning of Section 167.

**STATUTE AND REGULATIONS INVOLVED**

The statute and regulations involved are set out in the Appendix, *infra*, pp. 9-13.

**STATEMENT**

The facts found by the Board of Tax Appeals (R. 22-25), are as follows:

Carl M. Loeb had created a trust, or trusts, for his four children prior to 1918. He and his wife were trustees. A share of the corpus was distributable to each child in the discretion of the trustees

after the child reached majority, but was to be distributed not later than when the child reached forty. Carl told his sons Carl, Jr., and Henry, in 1928, that the shares of Margaret and John had been distributed to them several years previously, and thereafter the remaining trust corpus had increased to such an extent that the shares left for Carl, Jr., and Henry were much larger than the shares distributed to Margaret and John, so he requested Carl, Jr., and Henry to create a trust of their shares to benefit their mother, their sister, their brother, and themselves. Carl, Jr., and Henry were then of age. They received their shares of the old trust and used that property to create a new trust. (R. 22, 54-55, 57.)

The new trust was created on January 16, 1929. (R. 44-52.) They made their father the sole trustee and provided that he should pay the income of the trust at the end of each year to one or more of the following beneficiaries in such proportions as he in his absolute discretion might choose (R. 22-23, 41, 44-45):

- (1) Adeline L. Loeb, wife of Carl and mother of the grantors
- (2) Margaret L. Kempner, sister of the grantors
- (3) John L. Loeb, brother of the grantors
- (4) Carl M. Loeb, Jr. }
- (5) Henry A. Loeb    } the grantors

or the surviving descendants of any of the above who should die during the continuance of the trust

(R. 23, 41, 45). The trustee was given possession and control of the trust corpus. (R. 23, 48-49.)

The trust was irrevocable and was to continue until the death of the father, when the corpus was to be divided equally among the three brothers and their sister. (R. 23, 44-46.) A successor trustee could be appointed under certain circumstances, but he was required to distribute the annual income equally among the three brothers and their sister.<sup>1</sup> (R. 23, 44, 45-57.)

The trust continued through 1935 and during that period the distributions of annual income were as follows (R. 23, 39-40, 56-57, 59):

	1929	1930	1932	1934	1935
Adeline.....		\$40,560.90	\$15,362.00	\$24,892.22	\$32,550.92
Margaret.....				20,000.00	52,550.92
John.....	\$39,791.05				
Carl, Jr.....	79,582.11				
Henry.....	79,582.11			5,000.00	52,550.91

No distributions were made of any income for 1931 and 1933. (R. 24, 38, 57.)

Carl M. Loeb, his wife, their daughter, Margaret, and their son, John, each had a substantial estate created by Carl M. Loeb. The following table shows their income for 1933 and 1934 (R. 24, 41-43):

<sup>1</sup> Although the Board so found, the record indicates that the mother would also be entitled to a distributive share. (R. 45.)

1933

	Income	Capital losses	Total
Carl.....	\$209,232.23	\$144,115.09	\$65,117.14
Adeline.....	6,066.38	41,629.77	-35,563.39
Margaret.....	20,987.89	14,049.90	6,937.99
John.....	162,071.18	253,216.02	-91,145.44

1934

	Income	Capital gains	Capital losses	Trust distribution	Total
Carl.....	\$152,448.98	\$10,550.80			\$162,999.78
Adeline.....	6,184.46		\$5,324.25	\$24,892.22	25,752.43
Margaret.....	14,932.47	3,884.92		20,000.00	38,817.39
John.....	112,672.30	28,654.46			141,326.76

Margaret and John were married and lived apart from their parents. Carl M. Loeb always maintained his family upon a scale of living consistent with his means. He paid annual rent for summer and winter homes during 1933 and 1934 in the amount of \$17,000. The living and household expenses of Loeb and his wife exceeded \$25,000 annually in addition to the rent. The distributions received by Adeline and her separate income were used to defray all household and personal expenses except rent. (R. 24, 42.)

The income of the trust for the years 1933 and 1934 was as follows (R. 25, 38-39):

Year	Ordinary income	Dividends	Capital net loss
1933.....	\$31,769.79	\$33,957.00	\$72,392.72
1934.....	36,129.53	31,464.98	

The Commissioner in determining the deficiencies included one-half of the above items in computing the income of the two grantors, less, however, in the case of Henry A. Loeb, the sum of \$5,000 actually distributed to him during the year 1934 and reported by him in his return for that year. (R. 25, 38-39, 84-85.)

Upon review, the Board of Tax Appeals sustained the Commissioner and the court below has affirmed the decisions of the Board.

#### ARGUMENT

The grantors, Henry and Carl, Jr., were taxable under Section 167 (a) (2), which provides that where any part of the income of a trust "may, in the discretion of the grantor or of any person [their father] not having a substantial adverse interest" in the disposition of such income, be distributed to the grantor, then such income shall be taxed to the grantor. The sole question in this case is whether the father had a "substantial adverse interest" in the income. If he did not, then the foregoing provisions unambiguously require that the grantors be charged with the income in question.

It is undisputed that the father had no interest as such in the income in question. Petitioners' sole basis for urging that he did have a substantial adverse interest in the income is that the father could have allotted the income to his wife whom he was legally obligated to support. But the short answer to that contention is that, under the trust instru-



ment, she would not be required to use it for her support.<sup>2</sup>

The decision below is correct, and there are no conflicts warranting further review.

*Helvering v. Hormel*, 111 F. (2d) 1 (C. C. A. 8th), certiorari granted, No. 257, present Term, involves primarily a question relating to scope of review in the circuit courts of appeals, and the tax in that case was sustained upon the basis of *Helvering v. Clifford*, 309 U. S. 331, which rests upon different statutory provisions.<sup>3</sup>

<sup>2</sup> Compare *Hill v. Commissioner*, 88 F. (2d) 941 (C. C. A. 8th), where a husband created a trust (1) to pay \$12,000 a year to his wife, and (2) to pay such amounts as may be necessary for her support and the maintenance of their family home. No tax was imposed upon him with respect to the \$12,000, since it was not necessarily directed towards the discharge of an obligation; but the amounts paid to her under the second provision were attributed to the husband for income tax purposes.

<sup>3</sup> The Government had unsuccessfully contended in the circuit court of appeals in the *Hormel* case that the grantor was taxable under Section 167 as well. There the taxpayer had created a trust to pay certain income to his wife who was to expend it for the benefit of their children. The Government had contended that since such income might be used for the support of those children the father would be relieved *pro tanto* of an obligation, and that he was therefore taxable under Section 167 (a) (2). The theory was that the use of the income for his children was equivalent to a distribution to him under Section 167. In deciding that the father was not taxable under Section 167, the court in the *Hormel* case held, erroneously we believe, that the wife by reason of her position as guardian and by reason of her supposed duty under applicable state law to account for the income in question, had a "substantial adverse interest". No such situation is here presented.

Nor is *Savage v. Commissioner*, 82 F. (2d) 92 (C. C. A. 3d), in conflict with the decision below. That case did not involve the interpretation of the critical statutory language in the present case ("substantial adverse interest"). The opinion merely intimated that the grantor's husband might be taxable because the trust income was distributable to him to be used by him in discharge of his obligation to support his minor children. In the instant case there is plainly no provision authorizing the father to employ the income in satisfaction of his legal obligations.

CONCLUSION

The decision below is correct. There is no conflict with any decision in any circuit court of appeals. The petition should be denied.

Respectfully submitted.

FRANCIS BIDDLE,  
*Solicitor General.*

NOVEMBER, 1940.

